

ORIGINAL

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

JUN 20 2013

JAMES V. HARTEN, Clerk
By: *[Signature]*
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
for the Northern District of Georgia
Atlanta Division

SOUTHERN ENVIRONMENTAL
LAW CENTER,

Plaintiff,

v.

FEDERAL HIGHWAY
ADMINISTRATION,

Defendant.

No.

1:13-CV-2073

COMPLAINT
FOR DECLARATORY
AND INJUNCTIVE RELIEF

RLV

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for declaratory and injunctive relief compelling the Federal Highway Administration ("FHWA") to waive fees for access to public records related to a massive highway project, to produce those records promptly, and ordering FHWA to cease and desist its unlawful pattern and practice of improperly denying public access to agency records by denying FOIA fee waiver requests and failing to respond to the appeal of those fee waiver denials.

2. On three separate occasions over the past nineteen months, Plaintiff requested records relating to FHWA's oversight and funding of the Northwest Corridor Managed Lane Project ("NWCP"), a billion dollar transportation project that will directly affect hundreds of thousands of metro Atlanta commuters every day. In each instance Plaintiff, a non-profit public interest organization, asserted its statutory right to a fee waiver for the request. In each instance FHWA improperly denied the fee waiver requests and, when Plaintiff timely filed administrative appeals of those decisions, FHWA failed to respond within the statutory timeframe. As of the date of this filing, Plaintiff has not received a response to any of the appeals or access to the requested records. Plaintiff therefore seeks relief from this Court as provided in FOIA.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552, 28 U.S.C. § 1331, and 28 U.S.C. § 2201.

4. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B).

THE PARTIES

5. Plaintiff Southern Environmental Law Center, Inc. ("SELC") is a 501(c)(3), nonprofit public interest environmental law firm with a focus on six southeastern

states. SELC's Georgia office is located at 127 Peachtree Street, Atlanta, Georgia 30303. The FOIA requests at issue in this suit were initiated from that office.

6. Plaintiff works collaboratively with more than 100 partner groups who depend on its legal expertise to complement and strengthen their efforts. Plaintiff works with its partners and clients exclusively on a pro bono basis.

7. Among other areas, Plaintiff works to advance the public interest in sustainable transportation strategies on the local, regional, and national levels. Plaintiff analyzes transportation policies and projects that adversely impact the natural environment, public health, and quality of life, disseminates information to the public to inform debate about such policies and projects, and interacts with government officials to advance sustainable transportation policies.

8. Plaintiff communicates broadly with the public through a wide variety of media, including its website, press releases, reports, interviews with the media, presentations to other organizations or the general public, and its Atlanta-focused transportation blog. Plaintiff has used many of these tools to communicate information and raise public awareness of the NWCP.

9. Plaintiff has followed the development of the NWCP for nearly a decade, submitting numerous and extensive comments to FHWA and the Georgia Department of Transportation ("Georgia DOT") on the project. These comments

were submitted on behalf of numerous other public interest organizations and their respective memberships.

10. Plaintiff is a “person” within the meaning of FOIA.

11. Defendant FHWA is an agency within the Department of Transportation, a Department of the Executive Branch of the United States Government. FHWA has substantial authority to oversee the implementation of federal transportation laws through and in consultation with state departments of transportation. These responsibilities include the design, finance, construction, and maintenance of the United States’ highway system. Defendant FHWA’s responsibilities also include the application of federal transportation and environmental laws to transportation projects advanced by state departments of transportation, such as the NWCP advanced by Georgia DOT.

12. Upon information and belief, the documents sought in the FOIA requests at issue here are situated and maintained at FHWA’s Georgia Division office. FHWA’s Georgia Division office is located at 61 Forsyth Street, Suite 17T100, Atlanta, Georgia 30303.

13. FHWA is an “agency” within the meaning of FOIA.

LEGAL BACKGROUND

FOIA and its Fee Waiver Provision

14. FOIA “is the most prominent expression of a profound national commitment to ensuring an open government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.”

President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009).

15. Upon receipt of a FOIA request, a federal agency must conduct a search reasonably calculated to uncover all relevant documents and must make non-exempt responsive records “promptly available.” 5 U.S.C. § 552(a)(3)(A).

16. FOIA directs federal agencies to furnish requested records “without any charge or at a charge reduced below the fees established . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

17. “Congress added the fee waiver provision as an amendment to the FOIA in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests.” Ettlinger v. F.B.I., 596 F.Supp. 867, 872 (D.Mass. 1984). “[E]xcessive fee charges and refusal to waive fees in the public

interest remain ‘toll gates’ on the public access road to information” and FOIA’s public interest/benefit test contemplates “requests from journalists, scholars and non-profit public interest groups.” Id. at 872-873 (internal citations and formatting omitted).

18. The Department of Transportation has promulgated regulations providing further guidance on the types of FOIA requests eligible for fee waivers. 49 C.F.R. § 7.44 (June 12, 2008).

FACTUAL BACKGROUND

The Northwest Corridor Project

19. The NWCP is a precedent-setting project for Atlanta in a number of respects, including its complexity, expense, financial structure, tolling policy, potential impact to the state’s credit, and the hundreds of thousands of commuters it would directly affect daily.

20. The NWCP is estimated to cost approximately \$1 billion and would add 26 miles of reversible toll lanes along parts of Interstates 75 and 575 northwest of Atlanta. Hundreds of thousands of commuters and other travelers use these segments of Interstate 75 and 575 each day. The NWCP would be one of the most expensive road construction projects in Georgia’s history.

21. The NWCP's toll lanes would be "managed lanes," meaning the toll would increase and decrease throughout the day to actively manage demand and regulate the number of vehicles using the lanes. Managing the tolls in this fashion is intended to improve the performance of the managed lanes.

22. The State of Georgia plans to finance and construct the NWCP through a public-private partnership, in which the state would contract with a private, for-profit entity to design, build, and finance the project. Georgia has not previously used this type of public-private partnership to construct large-scale transportation projects like the NWCP.

23. A large portion of the NWCP's funding is expected to come from debt instruments backed by the project's toll revenue. Should the toll revenue fail to meet the projections, the State of Georgia will be responsible for repayment of the shortfall. Failure to repay the debt instruments would negatively affect Georgia's creditworthiness.

24. The NWCP is the second segment of a regional managed lane network proposed by the Georgia DOT. In its entirety, the regional managed lane plan is estimated to cost \$16 billion and cover hundreds of miles of interstate lanes throughout metropolitan Atlanta.

25. The first segment of this plan to be constructed was the High Occupancy Toll lane project on Interstate 85 northeast of Atlanta. The High Occupancy Toll lane project has generated intense media coverage and public discourse throughout metropolitan Atlanta.

26. The NWCP, the I-85 High Occupancy Toll lanes, and the region's managed lane strategy are topics of interest and debate in Atlanta. These projects are regularly covered by television, radio, and print media and have been the subject of extensive – and passionate – public discourse.

Plaintiff's FOIA Requests

27. Over the past nineteen months, Plaintiff submitted three FOIA requests to FHWA seeking records relating to the NWCP. Plaintiff submitted the requests on November 1, 2011 ("November 2011 Request"); September 28, 2012 ("September 2012 Request"); and December 13, 2012 ("December 2012 Request"). In each case, Plaintiff requested a waiver of search, review, and duplication costs for the request. In each case FHWA denied the fee waiver request and, when Plaintiff appealed the decision, FHWA failed to respond to the appeal.

28. FHWA's prolonged delay in responding to Plaintiff's fee waiver appeal has rendered the documents sought in the November 2011 and December 2012 Requests untimely or moot. However, the documents covered by the September

2012 request remain timely, important, of great public interest, and unavailable through other means. This Complaint seeks relief with regard to the September 2012 Request and with regard to FHWA's pattern and practice of handling fee waiver requests as demonstrated through its improper treatment of the three requests.

I. November 2011 Request

a. Content of Request

29. By letter dated November 1, 2011, Plaintiff filed a request under FOIA for records relating to the NWCP. (Attached as Exhibit A). Plaintiff's request focused on documents not already in the public domain, such as correspondence between FHWA staff and other parties relating to the project's environmental impact statements.

30. Plaintiff requested a full or partial fee waiver of fees associated with the November 2011 Request.

31. In support of this request, Plaintiff noted that it is a nonprofit organization with "experience disseminating public information regarding FHWA regulatory and operations issues." Plaintiff stated that the fee waiver would "benefit the general public through increased notice and understanding of the operations of the government and of potential or proposed major policy incentives."

32. Plaintiff documented its intent to review and disseminate the requested information to the public via websites, publications, conferences, and public meetings. Plaintiff explained that disclosure of the requested records was not made in furtherance of any commercial interest.

b. Fee Waiver Denial

33. By letter dated November 9, 2011, FHWA denied Plaintiff a fee waiver for the November 2011 Request. (Attached as Exhibit B)

34. FHWA concluded that Plaintiff failed to satisfy five of the six criteria required for a fee waiver under 49 CFR § 7.44. FHWA reasoned that Plaintiff failed to demonstrate how the requested documents would contribute to an understanding of Federal operations or activities, and how the information would inform the public at large, as opposed to a narrow segment of interested persons. FHWA concluded that Plaintiff failed to describe with specificity how disclosure of the documents would enhance public understanding to a significant extent; that, as a legal organization, there was some indication that Plaintiff's FOIA request had a commercial interest despite being a nonprofit organization; and that Plaintiff's potential commercial interest in the requested documents outweighs the noncommercial interests in sharing the information with the public.

35. FHWA estimated the search, review, and duplication costs associated with the November 2011 Request to be \$4,684.00.

c. Fee Waiver Appeal

36. By letter dated December 8, 2011, Plaintiff timely submitted an administrative appeal of the November 2011 fee waiver denial pursuant to 49 C.F.R. § 7.21 (July 16, 1998). (Attached as Exhibit C).

37. In support of the appeal, Plaintiff provided additional information and supporting documentation in direct response to concerns cited by FHWA's denial. Plaintiff explained that few, if any, of the requested documents had been made available to the public, and once obtained the requested information would be analyzed and shared with the general public in a manner that would facilitate civic discourse about the project. Plaintiff also described in detail its ability to review, understand, and synthesize responsive records to inform public debate and its capacity to disseminate information using a variety of methods, such as its website, press releases, interviews, and reports, thereby contributing to the public understanding of the NWCP.

38. Plaintiff noted the strong public interest in understanding the federal agency involvement with such a complex and expensive project, and in receiving the

information necessary to participate meaningfully when there are opportunities for public comment and debate.

39. With respect to the agency's assertion that Plaintiff had a commercial interest in the documents, Plaintiff asserted that the records have no financial value. Plaintiff would not gain financially by selling or distributing the information contained in the documents. And because it represents its clients and partners on a pro bono basis, it does not profit from or otherwise have a commercial interest in document review or litigation.

40. Having received no response from FHWA over the following months, on April 9, 2012, Plaintiff wrote a second letter to FHWA reiterating the appeal of the November 2011 fee waiver denial.

41. By September 2012, FHWA still had not responded to Plaintiff's appeal and during the intervening ten months significant changes to the project's financing structure had rendered many of the documents sought in the November 2011 Request moot or obsolete. Therefore, via letter dated September 28, 2012, Plaintiff withdrew the November 2011 Request and related appeal.

II. September 2012 Request

a. Content of Request

42. The September 28, 2012 correspondence included a new, modified FOIA request related to different NWCP financial documents (hereinafter, the “September 2012 Request” and attached as Exhibit D).

43. The September 2012 Request differed in content and was significantly narrower in scope than the previous request. It sought five discrete categories of documents, each limited by subject matter and date:

- (i) Email correspondence from September 1, 2011 to the date of the request relating to the NWCP;
- (ii) Documents from January 1, 2012 to the date of the request relating to anticipated toll revenue from the NWCP;
- (iii) Documents from January 1, 2012 to the date of the request relating to any Transportation Infrastructure Finance and Innovation Act loan or grant for the NWCP;
- (iv) Documents from January 1, 2012 to the date of the request relating to any Grant Anticipation Revenue Vehicle bonds for the NWCP;

(v) Documents discussing the applicability of the decision by the United States Court of Appeals for the Fourth Circuit in N.C. Wildlife Fed’n. v. North Carolina DOT, 677 F.3d 596 (4th Cir. 2012) to the NWCP.

44. Plaintiff again requested a waiver of any search, review, and duplication fees for the September 2012 Request.

45. In support of the fee waiver request, the September 2012 Request included a detailed discussion of the fee waiver analysis and extensive supporting documents.

46. Plaintiff discussed in detail each of the five categories of documents requested, including why that information was of public interest and why existing information on those subjects was insufficient. With respect to public interest, Plaintiff specified that the requested documents covered “a number of important decision points for the project, including the cancellation of the previous public-private partnership arrangement, formulation of the current public-private partnership arrangement, the commitment of additional state resources to cover the funding gap, public acceptance of another managed lane project in the region, and the region’s [July 2012] transportation sales tax vote,” which are all subjects of “great importance and interest to the general public.”

47. Plaintiff discussed its capacity and intent to disseminate the requested information to increase the general public’s understanding. It identified a number

of methods Plaintiff used for communicating information to the public beyond its website, such as periodic newsletters, reports synthesizing information obtained through public records requests, press releases, social media platforms, and the organization's transportation blog. Plaintiff stated its intention to review the contents of the documents and use all of these tools to raise public awareness and understanding of the NWCP.

48. Finally, Plaintiff reiterated that as a 501(c)(3) not-for-profit organization, it had not and would not bill any client for its work regarding the NWCP. The requested documents reflect FHWA's consideration of the project's transportation and financial merits – information of great importance to the public at large but without any inherent commercial value to Plaintiff.

b. Fee Waiver Denial

49. By letter dated October 31, 2012, the Georgia Division of FHWA denied Plaintiff's September 2012 FOIA fee waiver request. (Attached as Exhibit E).¹

50. Bearing striking similarities to the previous fee waiver denial, FHWA concluded that Plaintiff failed to satisfy five of the six criteria for a fee waiver set forth in the FHWA regulations. FHWA asserted that Plaintiff had not "provided sufficient detail regarding government activities or operations that are of a genuine

¹ Although dated October 31, 2012, the fee waiver denial letter was not received by Plaintiff until the following week.

public concern”; inferred that Plaintiff would only disseminate the requested information on its website; and restated that the requested information was “already available to the public.”

51. Additionally, the agency again speculated that Plaintiff had a commercial interest in the information, stating that “it would not be unreasonable to conclude that a non-profit organization that practices legal advocacy has dual interests in obtaining information related to the pending project referenced above.”

52. The cost of search and duplication associated with producing the requested records was estimated to be \$905.00. Review costs were not included in the estimate. Under FOIA, review costs are not recoverable from non-commercial requestors. 5 U.S.C. § 552(a)(4)(A)(ii).

c. Fee Waiver Appeal

53. On December 6, 2012, Plaintiff timely submitted an administrative appeal of the September 2012 fee waiver denial pursuant to 49 C.F.R. § 7.21. (Attached as Exhibit F).

54. In support of its appeal, Plaintiff provided additional analysis, information, and supporting documentation in direct response to the concerns cited in FHWA’s denial, including specific details regarding the public’s interest in the requested documents, Plaintiff’s ability to disseminate information to the general public

through a variety of channels, and noting that the documents requested are not publicly available.

55. In response to FHWA's concern regarding the "highly voluminous amount of documentation" requested, Plaintiff offered to narrow the request to exclude all attachments from email documents.

56. Plaintiff questioned why key portions of the September 2012 fee waiver denial letter relied on generic analysis copied verbatim from other FHWA fee waiver denials, noting that these previous requests sought different documents, had different import to the public, and relied on different justifications to support the fee waiver. Plaintiff noted that large portions of FHWA September 2012 fee waiver denial made no reference to the documents requested, the content of those documents, or the information, materials, and commitments submitted as part of the September 2012 Request.

d. Service of Appeal and Subsequent Correspondence

57. A copy of the appeal was sent by regular mail to FHWA's designated staff person, Ms. Sarah Shores, at the address contained in the fee waiver denial letter. Courtesy copies of the appeal were sent to additional staff in FHWA's Georgia Division by regular mail, and to FHWA's Washington, D.C. office by electronic

mail. Service of the courtesy copies was perfected in the days following the appeal.

58. On December 17, 2012, the U.S. Postal Service returned the package addressed to Ms. Shores. The package was marked “no longer at DOT headquarters,” and the ZIP code was blackened out. Plaintiff contacted FHWA staff on December 17, 2012, and received confirmation that Ms. Shores continues to work at FHWA and that the address was in fact correct.

59. Plaintiff re-sent the package on December 18, 2012, via U.S. Postal Service certified mail, return receipt requested, to Ms. Shores and a courtesy copy to the staff of the FHWA Georgia Division. Plaintiff received the US Postal Service Domestic Return receipt from the package sent to the Georgia Division

60. Plaintiff never received the U.S. Postal Service Domestic Return receipt from the package addressed to Ms. Shores, but the U.S. Postal Service website indicated FHWA’s receipt of the package containing the appeal on December 26, 2012.

61. Plaintiff received no response to the appeal in the month following its delivery.

62. Therefore, on January 31, 2013, Plaintiff contacted FHWA to request written confirmation that the search fees associated with the September 2012 Request

would be because the appeal had not been answered within the statutory deadline. See, 5 U.S.C. § 552 (a)(4)(A)(viii) (An agency shall not assess search fees if the agency fails to comply with any statutory time limit unless unusual or exceptional circumstances apply to the processing of the request.). Further, because the duplication costs were not expected to exceed \$250, Plaintiff requested that FHWA produce the responsive documents pursuant to 5 U.S.C. § 552 (a)(4)(A)(v). (Attached as Exhibit G).

63. In response to the letter, FHWA staff contacted Plaintiff by telephone. FHWA staff advised Plaintiff that, despite multiple copies of the appeal having been received by various FHWA staff the preceding month, the September 2012 appeal had not been properly docketed and entered into FHWA's computer system. By letter dated February 1, 2013, FHWA advised Plaintiff that the September 2012 appeal had been docketed and assigned an appeal number by FHWA. (Attached as Exhibit H).

III. December 2012 Request

a. Content of Request

64. On December 13, 2012, Plaintiff filed a third request for documents regarding the NWCP. (Attached as Exhibit I).

65. Plaintiff noted that Georgia DOT had recently announced that the project's final environmental review document, its Record of Decision, had been delayed due to changes in the modeling relied upon in the previous environmental review. Plaintiff requested documents related to these changes, asserting that the cause of the delay and changes to the project's projected performance were both topics of public interest. Plaintiff noted that the information in the requested documents was not currently available to the public and that no further information explaining the delay of the Record of Decision had been provided to the public.

66. Plaintiff again requested a waiver of any fees associated with the request.

b. Fee Waiver Denial

67. On January 15, 2013, FHWA staff emailed Plaintiff seeking clarification regarding the December 2012 Request and suggested that Plaintiff withdraw the request due to the potential applicability of deliberative process privilege.

68. The following day, Plaintiff responded to provide clarification and narrow the December 2012 Request by subject matter, date, and recipient. Plaintiff offered to review the documents at FHWA's office to further reduce the required search and review. Plaintiff declined to withdraw the request and provided legal authority explaining that privilege should not be considered as part of the fee waiver analysis.

69. Two days later, FHWA denied a fee waiver for the December 2012 Request via email, concluding that Plaintiff failed to satisfy three of the six criteria set forth in the FHWA regulations. (Fee waiver denial and preceding exchange of emails attached as Exhibit J).

70. The December 2012 fee waiver denial relies on many of the same arguments as the preceding fee waiver denials and suffers many of the same shortcomings.

71. The search and duplication costs for the responsive records were estimated to be \$1,190.00. Review costs were once again not assessed, as the fee waiver denial characterizes Plaintiff as a non-commercial requestor.

c. Fee Waiver Appeal

72. On February 12, 2013, Plaintiff timely submitted an administrative appeal of the December 2012 fee waiver denial pursuant to 49 CFR § 7.21. (Attached as Exhibit K).

73. In the appeal, Plaintiff reiterated that the NWCP is of intense interest and debate in Atlanta, and further clarified the nature of the public's interest in the project and the specific documents sought in the December 2012 Request. Plaintiff provided specific responses to each of the concerns raised by FHWA in the fee waiver denial, explaining that:

- (i) The December 2012 Request expressly identifies a number of methods that Plaintiff uses for communicating information to the general public in addition to Plaintiff's website;
- (ii) None of the requested information is available to the public through FHWA or Georgia DOT;
- (iii) The two websites identified by FHWA in the fee waiver denial as providing information regarding the project do not contain any of the requested information and do not cover the dates of Plaintiff's request.

74. Plaintiff again identified key portions of FHWA's denial letter that rely on boilerplate language, insufficient analysis, improper interpretations of law, and that fail to consider the specific information submitted by Plaintiff in support of its request.

d. Service of Appeal and Subsequent Correspondence

75. Pursuant to the instructions set forth in the fee waiver denial, Plaintiff's appeal of the December 2012 Request was sent by United Parcel Service to the designated FHWA staff person and an additional copy was sent to FHWA's contact person via facsimile. Courtesy copies were sent to FHWA staff in the Georgia Division and Washington, D.C. offices by electronic mail. Plaintiff

received confirmation that both the facsimile and the United Parcel Service package were delivered.

76. In serving these appeals, Plaintiff requested that FHWA confirm their receipt due to the difficulty associated with delivery of the last appeal. Plaintiff was not contacted by FHWA regarding any delivery issues.

77. FHWA's next communication with Plaintiff regarding the December 2012 appeal occurred on February 26, 2013, when FHWA staff contacted Plaintiff with questions regarding the status of the outstanding FOIA requests and appeals relating to the NWCP. Specifically, FHWA staff was unable to identify the various requests and fee waiver appeals in FHWA's database and sought clarification regarding the dates and FHWA-issued control numbers for each request.

78. In response to this telephone call, Plaintiff provided FHWA staff with a timeline chronicling all three FOIA requests and fee waiver appeals, including the associated control numbers. (Attached as Exhibit L).

79. Having received no response to either the September 2012 or the December 2012 appeal, on April 26, 2013, Plaintiff requested an update from FHWA staff regarding the status of the appeals. FHWA advised Plaintiff that the two appeals

were on its “non-complex track” and that it was working through a backlog with several cases ahead of Plaintiff’s.

80. On May 7, 2012, Plaintiff again contacted FHWA regarding the outstanding FOIA appeals. Noting that the statutory deadline to respond to the pending appeals had long since passed, Plaintiff requested confirmation that under 5 U.S.C. § 552 (a)(4)(A)(viii) FHWA would no longer seek recovery of search fees (attached as Exhibit M).

81. In response to the May 7, 2012 email, FHWA staff contacted Plaintiff and again promised that responses to the pending appeals were forthcoming. In the course of this conversation, Plaintiff asserted that the search costs for the two requests had been waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(viii) and offered to pay the remaining duplication costs necessary to obtain the documents.

82. In response, FHWA advised Plaintiff that it would not produce the documents pursuant to this arrangement. FHWA also advised Plaintiff that it could not presently assert the existence of unusual or exceptional circumstances in processing the appeals.

83. To date, FHWA has not responded to Plaintiff’s December 2012 appeal.

Plaintiff's Constructive Exhaustion of Administrative Remedies

84. FHWA has failed to respond to Plaintiff's September 2012 and December 2012 appeals within the statutory deadline.

85. An agency's failure to respond to the administrative appeal of a FOIA decision within the statutory deadline constitutes constructive exhaustion of the requestor's administrative remedies. *Taylor v. Appleton*, 30 F.3d 1365, 1368 (11th Cir. 1994).

CLAIMS FOR RELIEF

**COUNT ONE:
Unlawful Denial of Fee Waiver
(September 2012 Request)**

86. Plaintiff incorporates by reference paragraphs 1 through 85 of this Complaint as if fully stated herein.

87. FHWA is required to provide records requested under FOIA at no charge or a reduced charge when disclosure of the requested records would be in the public interest as set forth in 5 U.S.C. § 552(a)(4) and 49 C.F.R. § 7.44.

88. Plaintiff's September 2012 Request and related appeal provided FHWA with considerable information and documentation demonstrating that the fee waiver requirements had been met for purposes of that request.

89. FHWA concluded that the September 2012 Request failed to satisfy five of the six criteria set forth in 49 C.F.R. § 7.44(f), and on that basis denied the requested fee waiver.

90. FHWA's conclusion relies on a number of legal and factual errors including:

- (i) FHWA's fee waiver denial ignores the information, materials and assertions submitted by Plaintiff in support of the request;
- (ii) FHWA's fee waiver denial fails to consider the content of the records requested;
- (iii) FHWA improperly relies on boilerplate language copied from previous letters;
- (iv) FHWA incorrectly asserts that the requested records are available to the public through other means;
- (v) FHWA relies on assumptions unsupported by the materials before it, including speculation about how the requested documents might be used and potential financial benefit to Plaintiff;
- (vi) FHWA fails to balance the public interest against Plaintiff's potential commercial interest as required by 49 C.F.R. § 7.44(f)(6).

91. FHWA's significant fee estimate, improper application of FOIA's fee waiver provisions, and failure to respond to administrative appeals combine to use

cost and delay as a formidable “roadblock” to frustrate Plaintiff’s ability to obtain non-public records regarding the NWCP. This roadblock results in less publicly available information, less public understanding of FHWA’s activities, and less robust civic debate concerning the NWCP.

92. FHWA’s fee waiver denial is subject to review and reversal under 5 U.S.C. § 552.

COUNT TWO
Unlawful Imposition of Search Costs
(September 2012 Request)

93. Plaintiff incorporates by reference paragraphs 1 through 92 of this Complaint as if fully stated herein.

94. FOIA prohibits the imposition of search costs when an agency fails to respond to an appeal within twenty days unless the agency demonstrates the existence of “unusual” or “exceptional circumstances.” 5 U.S.C. § 552(a)(4)(A)(viii). Congress enacted this requirement to impose consequences on agencies who fail to meet the statute’s deadlines.

95. FHWA did not respond to Plaintiff’s September 2012 appeal within the statutory deadline.

96. FHWA has not asserted the existence of “unusual” or “exceptional circumstances” as defined in 5 U.S.C. § 552.

97. Neither “unusual” nor “exceptional circumstances” as defined in FOIA are present in the September 2012 Request or related appeal.

98. Therefore, independent of the merits of the underlying fee waiver request, FHWA is barred from seeking recovery of search costs for the September 2012 Request.

99. In May 2013, Plaintiff offered to pay FHWA duplication fees in order to obtain the necessary documents.

100. FHWA declined this offer.

101. At the time it declined this offer, FHWA was unwilling or unable to assert the existence of unusual or exceptional circumstances as defined in FOIA.

102. FHWA’s refusal to produce the documents subject to payment duplication fees violates 5 U.S.C. § 552 (a)(4)(A)(viii) and is subject to review and reversal.

COUNT THREE

Pattern and Practice of Unlawful Denial of Fee Waivers and Delay (November 2011, September 2012, and December 2012 Requests)

103. Plaintiff incorporates by reference paragraphs 1 through 102 of this Complaint as if fully stated herein.

104. FHWA’s consideration of Plaintiff’s fee waiver requests establishes a pattern and practice of misapplication of FOIA and applicable regulations.

Specifically, FHWA’s actions demonstrate a pattern and practice of:

- (i) Failing to consider the specific documents requested when evaluating fee waiver applications;
- (ii) Failing to consider materials submitted by the requestor in support of fee waiver applications;
- (iii) Relying on boilerplate denial language unrelated to the request or the content of the requested documents;
- (iv) Relying on speculation and conjecture unsupported by the materials before it to support fee waiver denials; and
- (v) Improperly applying FOIA, regulations, and applicable caselaw.

105. FHWA's failure to respond to Plaintiff's FOIA appeals demonstrates a pattern and practice of failing to address administrative appeals as required by FOIA.

106. Upon information and belief, FHWA's difficulty receiving and properly docketing administrative appeals contributes to this failure.

107. FHWA's pattern and practice of failing to respond to administrative appeals perpetuates and enables its pattern and practice of unlawfully denying the fee waivers.

108. FHWA's pattern and practice of first denying fee waiver requests and then failing to respond to the appeal of those requests constitutes an informal policy that violates FOIA and its implementing regulations.

109. This pattern and practice is subject to review and reversal.

RELIEF REQUESTED

WHEREFORE, the Plaintiff respectfully requests this Court to grant judgment as follows:

- (i) With respect to Count One, a declaration that Plaintiff is entitled to a fee waiver for the September 2012 Request and an order requiring FHWA to produce the documents covered by that request as expeditiously as possible and without charge;
- (ii) With respect to Count Two, a declaration that FHWA may not assess search fees for the September 2012 Request and an order requiring FHWA to produce the documents as expeditiously as possible, subject to payment of duplication costs by Plaintiff;
- (iii) With respect to Count Three:
 - a. A declaration that FHWA engages in an unlawful pattern and practice of improperly denying fee waiver requests and failing to provide responses to administrative appeals;

- b. An order enjoining FHWA from continuing its pattern and practice of improperly denying fee waiver requests failing to provide responses to administrative appeals; and
 - c. An order directing FHWA to implement the necessary resources, controls, or procedures necessary to ensure compliance with FOIA and its regulations;
- (iv) Award Plaintiff its reasonable attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E);
- (v) Retain jurisdiction over this matter until FHWA fully complies with this Court's order; and
- (vi) Grant any other relief the Court deems just and proper.

Respectfully Submitted,



/s/ Brian Gist

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June 20, 2013